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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FEDERAL TRADE COMMISSION,

Petitioner,

v.

TICOR TITLE INSURANCE CO., INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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INTEREST OF *AMICUS CURIAE*

The Pennsylvania Electric Association ("PEA") is a trade association of investor-owned electric utilities operating in the Commonwealth of Pennsylvania. PEA's eleven member companies produce and distribute 98% of the electric energy consumed in Pennsylvania and serve 95% of the State's population.[1]

Each of PEA's members is a public utility subject to the pervasive regulation and supervision of the Pennsylvania Public Utility Commission. As such, they

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[1] PEA's members include: Citizens' Electric Company; Duquesne Light Company; Metropolitan Edison Company; Pennsylvania Electric Company; Pennsylvania Power & Light Company; Pennsylvania Power Company; Philadelphia Electric Company; Pike County Light and Power Company; UGI Corporation; Wellsboro Electric Company; and West Penn Power Company.

have a strong and continuing interest in the standards for state action immunity from the federal antitrust laws. Further, one of PEA's members is now the defendant in an antitrust action, *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, No. 91-CV-5176 (E.D. Pa. filed Aug. 12, 1991), which raises issues under the state action doctrine.

The Petitioner in the instant action, the Federal Trade Commission ("FTC"), has determined that the "active supervision" prong of the state action doctrine requires a showing that the State "has acted affirmatively to review and approve" the challenged private conduct, and in its Petition and Brief it now asks this Court to so rule. Pet. 12; Pet. Br. 5. Such a ruling would cause a fundamental change in existing law which would disrupt the system of State regulation of *amicus curiae's* members and would unfairly subject them to antitrust attack for past conduct which has served important State policies and has been actively supervised by the State. Accordingly, PEA submits this brief *amicus curiae* in support of neither party to assist the Court in its resolution of the proper legal standard for state action immunity.[2]

STATEMENT OF THE CASE

Amicus curiae adopts the statement of the case set forth in the court of appeals opinion. 922 F.2d 1122; Pet. App. 1a-40a.

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[2] Pursuant to Rule 36.2 of this Court, PEA has obtained the written consent of the petitioner and respondents to the filing of this brief *amicus curiae*. Copies of the letters setting forth such consent have been filed with the Clerk.

SUMMARY OF THE ARGUMENT

"The ultimate issue [in this case] is the meaning of the 'active state supervision' requirement in the context of the state action doctrine. . . ." Pet. Br. 2. The FTC held below that "the active supervision requirement is satisfied only where the state agency has acted affirmatively to review and approve the proposed tariff or rate." Pet. App. 55a. In its Petition for Writ of Certiorari, the FTC argued that: "This Court should grant certiorari to make clear that the 'active supervision' prong of the state action exemption requires a showing that the State 'has acted affirmatively to review and approve' challenged private conduct." Pet. 11-12.

The FTC's proposed new rule should be rejected for three reasons:

First, requiring affirmative review and approval as a condition to state action immunity would effectively turn the doctrine upside down. This Court has long recognized that the state action doctrine is based on principles of federalism. In recent years, the Court has often applied these principles to reject attempts to impose formalistic restrictions on the doctrine. The guidance provided by these decisions supports the rejection of the FTC's proposed test as well. *See City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985).

As the FTC's proceedings in this case demonstrate, the proposed rule would transform the "active supervision" prong of *California Retail Liquor Dealers*

Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), into an issue of fact for trial. This would embroil the FTC and the federal courts in the trial of State regulators to determine for themselves whether the State looked hard enough at the matter and engaged in what the FTC called a "meaningful examination." Pet. App. 59a.

Not only would such a rule destroy the federalism basis for the doctrine, but by adopting this test, the Court would in essence be commanding the States to follow the federal Administrative Procedure Act as a condition to immunity under the federal antitrust laws. Any State agency which failed to do so—and thus provide formal, written reviews, approvals and determinations for every action—would find its programs open to antitrust attack.

In addition, by forcing regulated parties to litigate State regulatory matters to the fullest in order to perfect an "affirmative review and approval" immunity defense, the proposed rule would cause regulatory "gridlock." The States depend on voluntary compliance with their regulatory programs. Under the FTC's proposed rule, voluntary compliance would increasingly be displaced by lengthy administrative litigation in order to achieve the required "affirmative review and approval."

Further, like the "compulsion" test the Government proposed and this Court rejected in *Southern Motor*, requiring formal State orders would likely increase the number of State-sponsored restraints on free market competition. If the State must now command each private act through issuance of a formal determination and order, then it will no longer be able to adopt

permissive programs in which it encourages and supervises, but does not command.

Second, contrary to the FTC's argument, the prior decisions of this Court do not require formal review and approval in order to demonstrate active supervision by the State. In each of the prior decisions denying state action immunity on the basis of inadequate supervision by the State, the State had no statutory authority or responsibility to regulate the challenged conduct. *See, e.g., Patrick v. Burget*, 486 U.S. 94 (1988); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987); *Midcal*.

Here, in contrast, the States have the authority and responsibility to oversee the challenged fees. In such cases, examining the States' exercise of that power too closely will destroy the very federalism that is the basis for the doctrine. In addition, such federal scrutiny of the exercise of State regulatory action is essentially boundless. Further, in the vast majority of State activities, the States have actually supervised the regulated parties as effectively as their federal counterparts, if not more so.

Third, changing the law to require such formal approval would create unjustified uncertainties and unfairly expose State programs to antitrust attack for prior conduct which satisfied the *Midcal* test. This Court has long respected established legal doctrines because of the strong public interest in predictability. This interest is even weightier where, as here, Congress has acquiesced in the established rule. Moreover, such a change would expose hundreds of State regulatory programs, and thousands of private regulated parties, to antitrust attack for past conduct which served State policies and was actively super-

vised, but which was never "affirmatively reviewed and approved."

ARGUMENT

I. REQUIRING THE STATE "AFFIRMATIVELY TO REVIEW AND APPROVE" EACH CHALLENGED ACT OF REGULATED PARTIES WOULD TURN THE STATE ACTION DOCTRINE UPSIDE DOWN.

The key to the state action doctrine is the recognition that the State's power to engage in regulation of its domestic commerce is deserving of federal judicial respect under our principles of federalism and state sovereignty. It is these principles which undergird the doctrine. As this Court first enunciated in *Parker v. Brown*, 317 U.S. 341 (1943), and has reiterated many times since, with Congress' acquiescence:[3]

> In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Id. at 351.

Over the past fifteen years, this Court has been called upon many times to clarify the line between "State" and "private" action. In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,

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[3] In adopting the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36, Congress implicitly acquiesced in the state action immunity doctrine. *See, e.g.*, S. Rep. No. 593, 98th Cong., 2d Sess. 5 (1984).

445 U.S. 97 (1980), the Court articulated the now-familiar two-pronged test:

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself.

Id. at 105 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978)).

The Government's position in this case would seem to be rebutted by the words of the test itself. If the Court had intended to require that "the State agency has acted affirmatively to review and approve" the challenged conduct, it could easily have said so and thereby avoided many years of litigation under both prongs of the *Midcal* rule. That the Court did not do so is important both for what it suggests the test was intended to mean, and for its reflection of the policies underlying the doctrine.

In litigation under the *Midcal* test this Court has consistently rejected restrictive and mechanical glosses. In *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), for example, the Court rejected the Government's proposed "inflexible 'compulsion requirement,' " holding that:

> The *Parker* doctrine represents an attempt to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace. A compulsion requirement is inconsistent with both values. It reduces the range of regulatory alternatives available to the State. At the same time, insofar as it

> encourages States to require, rather than merely permit, anticompetitive conduct, a compulsion requirement may result in *greater* restraints on trade. We do not believe that Congress intended to resolve conflicts between two competing interests by impairing both more than necessary.

Id. at 61.

Similar reasoning applies to the present effort to narrow the scope of *Midcal's* active supervision prong. Requiring the State "affirmatively to review and approve" and formally "to determine" that every act of a regulated party is consistent with State policy would: (a) destroy the federalism basis for the doctrine, (b) cause regulatory "gridlock," and (c) increase rather than decrease the number of State-sponsored restraints on competition.

A. Requiring Formal Review and Approval Would Destroy The Federalism Basis For The Doctrine.

The Court has consistently relied on our principles of federalism as the basis for the state action doctrine. Last term, for example, in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991), the Court refused to impose a requirement that the challenged municipal zoning be free from "substantive or even procedural defect[s]" under state law. *Id.* at 1349. In doing so, the Court expressed its concern that the doctrine not be interpreted in a manner which "undermin[es] the very interests of federalism it is designed to protect." *Id.* at 1350.

What are these principles of "federalism" which remain so vibrant that they can influence this Court's application of the federal antitrust statutes? Perhaps

the most eloquent statement is that of Justice Black writing for the Court in *Younger v. Harris*, 401 U.S. 37 (1971), about "Our Federalism:"

> The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id. at 44.

These principles are particularly applicable when federal courts review State regulatory programs under the federal antitrust laws. *See, e.g., Community Communications Co. v. City of Boulder*, 455 U.S. 40, 68 (1982) (Rehnquist, J., dissenting). "For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978).

From its first application to the California raisin stabilization plan in *Parker*, through the recent series of cases applying and refining the *Midcal* test, the Court has repeatedly drawn on "Our Federalism" for guidance in shaping the state action doctrine. The

resolution of these controversies has turned on this Court's judgment about how far federal antitrust interests should be advanced without "unduly interfer[ing] with the legitimate activities of the States." *Younger*, 401 U.S. at 44.

To be certain, this is not a bright line; but it is an extremely important one. Fortunately, we have a number of recent examples in which this Court has applied these principles of federalism to refine the state action doctrine. These cases, we submit, serve as guideposts for applying "Our Federalism" to decide the present controversy.

In *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), for example, the Towns challenged the City's refusal to provide sewage services unless the Towns agreed to be annexed. The Towns claimed that the state action doctrine could not apply unless the State had expressly recognized the potential anticompetitive consequences of its statutory scheme. Rejecting this argument, the Court reasoned that:

> Requiring such a close examination of a state legislature's intent to determine whether the federal antitrust laws apply would be undesirable also because it would embroil the federal courts in the unnecessary interpretation of state statutes. Besides burdening the courts, it would undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny.

Id. at 44 n.7.

The same reasoning applies to the FTC's proposed new test. Where States have the authority and re-

sponsibility to act, "[r]equiring such a close examination of a state['s]" ***exercise*** of its powers would intrude too far on the State's regulatory prerogatives. *Id.* If immunity depended upon the determination by a federal court or agency that the State had adequately reviewed and approved each challenged act, then the federal courts and agencies would become embroiled in the trial of State regulators to second-guess whether the State had engaged in a "meaningful examination." Pet. App. 59a. The trial below exemplifies precisely this type of intrusion since it involved the direct testimony and cross-examination of six State officials (*see* Pet. App. 140a n.2) as well as the examination of many official State documents (*see, e.g.*, J.A. 91-99, 108-113, 120, 124, 129, 132-134, 138-139, 143-148, 150-152).

Lower courts and commentators have recognized that the federal agencies and courts "should not scrutinize the rigor with which the state supervises the challenged activity" (*New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d 1064, 1076 n.18 (1st Cir. 1990)), because by doing so, "[i]nstead of being a doctrine of preemption, allowing room for the state's own action, [the state action doctrine] would become a means for federal oversight of state officials and their programs." *Id.* at 1071. In addition,

> "[t]here simply is no way to tell if the state has 'looked' hard enough at the data, and there certainly are no manageable judicial standards by which a court may weigh the various elements of a 'public interest' judgment in order to determine whether the legislature or agency decision was correct. Those

> are political judgments and ought to be made by the legislature and its delegates."

Id. at 1076 n.18. (quoting P. Areeda & D. Turner, *Antitrust Law* ¶ 213c, at 75 (1978)).[4]

Yet, that is precisely what the FTC seeks to do in this case. Indeed, in its brief to this Court, the FTC argues that state action immunity is an ordinary question of fact for trial, and that the lower court should have deferred to the Commission's fact findings. Pet. Br. 27. Under the Government's approach, unless clarified by this Court, there will likely be a flurry of state action immunity trials like that below. As in *Town of Hallie*, such a process will not only burden the courts, but undermine the federalism basis for the doctrine.[5]

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[4] This Court has long recognized that the federal courts are not authorized to "substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). Similarly, the federal courts do not sit as a "superlegislature to weigh the wisdom of legislation." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952).

[5] At least one lower court has held that: "The purpose of the state action doctrine is to avoid needless waste of public time and money." *Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Auth.*, 801 F.2d 1286, 1289 (11th Cir. 1986). As a result, the court held that denial of state action immunity was an appealable interlocutory order under the doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). In reaching this result, the court concluded that state action immunity is intended, like the qualified immunity for governmental action under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), to provide " 'immunity from suit rather than a mere defense to liability.' " *Hillsborough*, 801 F.2d at 1289 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). For this reason as well, the FTC's proposed rule should be rejected because it would require trial to resolve the immunity issue itself.

In *Southern Motor*, the Court again drew on "Our Federalism" to reject the argument that immunity should be available only when " 'necessary in order to make the regulatory Act work.' " 471 U.S. at 74 (quoting *Silver v. New York Stock Exch.* 373 U.S. 341, 357 (1963)).

> In [the] context [of federal regulatory restraints], if the federal courts wrongly conclude that an antitrust exemption is "unnecessary," Congress can correct the error. As the dissent recognizes, however, the Supremacy clause would prevent state legislatures from taking similar remedial action. Moreover, the proposed test would prompt the "kind of interference with state sovereignty . . . that . . . Parker was intended to prevent."

Id. at 58 n.21 (citation omitted).

The same reasoning requires the rejection of the FTC's proposed test. Like determinations of the "necessity" of the State rule, federal court determinations of whether there was a "meaningful examination" (Pet. App. 59a) by State officials would—as the record in this case clearly shows—prompt the kind of interference with State sovereignty that *Parker* was intended to prevent.

In *Southern Motor*, the Court also rejected the Government's claim that immunity should be available only when the challenged conduct is compelled by the State. Again drawing on "Our Federalism," the Court

concluded that such a rule "reduces the range of regulatory alternatives available to the State." 471 U.S. at 61. The FTC's proposed rule in this case goes even further than the Government's compulsion argument in *Southern Motor*. It would effectively restrict State regulatory activity to formal review and approval proceedings, eliminating less formal encouragement and permissive systems no matter how actively supervised by State officials.

The elimination of permissive state regulatory systems would unquestionably "reduce[] the range of regulatory alternatives available to the State." *Id.* For example, in 1983, the Pennsylvania Public Utility Commission determined "to encourage [electric utility] investment in energy supply alternatives such as conservation, load management and alternate energy supply projects" and declared that "[i]t is not our intent, at this time, to dictate what specific programs or projects are to be implemented by the electric utilities. . . ." 13 Pa. Bull. 3222, 3223 (Oct. 22, 1983). Rather, the Public Utility Commission required detailed annual reports and evaluations of each of these programs under a Commission-mandated benefit-cost test. 14 Pa. Bull. 4514, 4515 (Dec. 15, 1984). The very purpose of this approach was to "provide the necessary flexibility in program development, while enabling the Commission and all interested parties to evaluate specific conservation programs for specific utilities." 13 Pa. Bull. at 3224.

Utility conservation initiatives developed under this State program would qualify for state action immunity under the *Midcal* test because they serve a clear State policy and are actively supervised by the State. Under the FTC's proposed "affirmative review and approval" test, however, they may well fail because the State provides no mechanism for formal State approval of each program.

In *Omni*, the Court rejected yet another proposed restriction on the state action doctrine because of "Our Federalism." This time it was argued that procedural or substantive irregularities in the City's regulation of billboards should disqualify it from state action immunity. Rejecting this assertion, the Court explained that:

> "We should not lightly assume that [the state action doctrine's] authorization requirement dictates transformation of state administrative review into a federal antitrust job. Yet that would be the consequence of making antitrust liability depend on an undiscriminating and mechanical demand for 'authority' in the full administrative law sense."

111 S. Ct. at 1350 (quoting P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.3b at 145 (Supp. 1989)). With respect to the "authority" prong of the *Midcal* test, the Court applied our principles of federalism to allow a broader basis for the States to act:

> We . . . believe that in order to prevent *Parker* from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law.

Id.

This same reasoning applies to the FTC's contention here. If state action immunity is now to be re-

stricted to situations in which the State agency chooses to act through formal review, approval and a published determination, the very basis of *Parker* immunity will be destroyed. Potential antitrust liability for parties regulated by the State will now turn on "an undiscriminating and mechanical demand" (111 S. Ct. at 1350) for formalistic procedures and orders, much the same as the formalistic demand for "authority" which this Court rejected in *Omni*.

In *Omni*, the Court was also confronted with the argument, much like that advanced by the Government here, that the federal antitrust courts should themselves regulate State agencies by reviewing their actions to root out conduct which is "not in the public interest" or is in some sense "corrupt." 111 S. Ct. at 1352. In rejecting this contention as well, the Court explained that:

> *Parker* was not written in ignorance of the reality that determination of "the public interest" in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment, and it was not meant to shift that judgment from elected officials to judges and juries.

Id. As the Court reasoned, if such judgments were "made subject to *ex post facto* judicial assessment of 'the public interest, . . . we will have gone far to 'compromise the States' ability to regulate their domestic commerce." *Id.* (quoting *Southern Motor*, 471 U.S. at 56).

The States' regulatory capacity would be similarly compromised were the Court to adopt the Government's argument in this case. If the state action doctrine is to turn on the requisite degree of formality associated with the States' regulatory actions—that is, whether they reflect affirmative, formal review, approval and published determinations—then the FTC will have succeeded in imposing the federal Administrative Procedure Act on the States as a matter of federal antitrust law.

This characterization is not as fanciful as it may seem. At the trial below, the FTC's complaint counsel argued that immunity turned on the existence of State procedures—modeled on the federal Administrative Procedure Act—for notice, development of an agency record, and judicial review. Pet. App. 237a-238a. Such a requirement is every bit as intrusive on the "States' ability to regulate their domestic commerce" as is the public interest standard rejected in *Omni*. It would effectively "conscript state utility commissions [and other state regulators] into the national bureaucratic army." *FERC v. Mississippi*, 456 U.S. 742, 775 (1982) (O'Connor, J., concurring in part and dissenting in part).

Accordingly, the FTC's proposed rule should be rejected because it would destroy the federalism basis for the state action doctrine.

B. Requiring Formal Review and Approval Would Cause Regulatory "Gridlock."

In a nation of 250 million people, it is not enough that the States are free to formulate policies for their own domestic commerce. In order for these policies to be effective, the States must be able to rely on widespread, voluntary compliance with their regulatory initiatives. There are obviously not enough resources available, much less hearing rooms in the

State agencies, to undertake formal administrative action in every case. As the commentators have recognized, the State seeks "ungrudging compliance . . . and voluntary participation in its regulatory structures." I P. Areeda & D. Turner, *Antitrust Law* ¶ 217, at 109 (1978).

If the regulated parties believe they risk being caught in the "jaws" of State regulatory policy and antitrust treble damages, then their ungrudging compliance with the State regulatory program obviously will be chilled. *Cf. Hoover v. Ronwin*, 466 U.S. 558, 580 n.34 (1984) (threat of damages will deter voluntary participation). In these circumstances, they will undoubtedly feel constrained to challenge many more State regulatory initiatives in order to generate the full record necessary for immunity.

If regulated parties are forced to protect themselves in this manner, then many State agency proceedings will be transformed into a lawyer's marathon of protest and appeal which would stymie the "States' ability to regulate their domestic commerce" as effectively as the reversal of *Parker* itself.

In Pennsylvania, for example, the Public Utility Commission regulates approximately 5,000 public utility entities providing electricity, natural gas, telephone, telegraph, water, sewage, steam, transportation and pipeline services. Pennsylvania Public Utility Commission, *1989-90 Annual Report* at 2. During its 1990 fiscal year, the Commission conducted proceedings for 59 fixed utility rate cases, 194 audits, 11 management audits, 7,978 consumer complaints, 8,290 mediation, requests, 27,000 motor carrier inspections, and 41,000 freight car inspections. *Id.* at 1. During this time period, the Commission

issued 9,198 Orders, 4,332 reports, heard more than 50,000 pages of testimony and "filed and docketed" more than 130,000 documents. *Id.*

Looking at the national pattern of proceedings for State utility commissions, a similarly large case load appears. Of the twenty-five States reporting on utility commission proceedings concluded during 1990, the average per State was 1,120.2 formal proceedings. NARUC, *Annual Report on Utility and Carrier Regulation* at 941 (1990). Of the thirty States reporting on the number of customer and other complaints processed in addition to commission proceedings, the average was 4,411.4 per State in 1990 alone. *Id.* Assuming that the non-reporting State commissions have similar dockets, State utility commissions conducted approximately 276,580 complaint and other proceedings during 1990.

The potential for regulatory "gridlock" in the States' regulation of utilities alone is significant. If only 20% of these proceedings were antitrust-sensitive, and regulated parties requested formal hearings in those proceedings because of this changed state action rule, State utility commissions would face more than 55,000 additional formal hearings each year. In normal economic times, this new load would cause regulatory "gridlock" by anyone's definition. In the present financial circumstances of the various States, it would likely cause a regulatory disaster.[6]

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[6] *Amicus* has been unable to locate hard data with respect to the number of proceedings conducted by other State regulatory agencies during 1990, such as those responsible for environment, land use, health care, education, agriculture, alcohol control, conservation, employment, urban and economic development, motor

For this reason as well, the Court should reject the FTC's proposed test.

C. Requiring Formal Review and Approval Would Increase Rather Than Decrease The Number Of State-Sponsored Restraints On Competition.

In rejecting the "compulsion" test proposed by the Government in *Southern Motor,* this Court emphasized that such a restriction would not only reduce the range of regulatory alternatives available to the States; but also, "insofar as it encourages States to require, rather than merely permit, anticompetitive conduct, . . . [it] may result in *greater* restraints on trade." 471 U.S. at 61.

The FTC's proposed new test would likely have similar effects. By limiting immunity to State proceedings with formal "determinations" (Pet. Br. 16), it is likely to stimulate the growth of State agency "orders" which evidence the requisite "affirmative review and approval." Agency "orders" are typically binding on the State and the regulated parties and naturally tend to restrict variations in conduct, displacing permissive regulatory programs in much the same way as would the compulsion requirement rejected in *Southern Motor*. In the example of the Pennsylvania Public Utility Commission's encouragement of electric energy conservation, see discussion, *supra,* at 14, the State would have been forced to command certain conduct, rather than encourage and actively supervise it.

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vehicles, and waste management matters. The proceedings conducted by these other agencies would, however, likely be several times more than those conducted by the utility commissions alone. Thus, the potential for regulatory "gridlock" is likely to be even greater.

Because of its likely impact in increasing the number of State-sponsored restraints on competition, the Court should reject the FTC's proposed standard.

II. FORMAL REVIEW AND APPROVAL BY THE STATE IS NOT REQUIRED IN ORDER TO ASSURE THAT THE CHALLENGED ACTIONS "ACTUALLY FURTHER STATE REGULATORY POLICY."

The FTC argues that this Court's decisions in *Midcal, 324 Liquor,* and *Patrick* "have recognized that the state action exemption does not apply to private conduct unless state officials determine that the particular conduct furthers, or is at least consistent with, the State's policies." Pet. Br. 17. Petitioner claims that unless "the state agency has acted affirmatively to review and approve" the challenged private conduct (Pet. Br. 5; Pet. App. 55a), there can be ***"no assurance"*** and ***"no basis*** for concluding that respondents' anticompetitive price fixing was consistent with state policy." Pet. Br. 14 (emphasis supplied).[7]

Contrary to the FTC's contention (Pet. Br. 17), this Court's decisions in *Midcal, 324 Liquor,* and *Patrick* do not support this proposition. In each of these cases, ***the State was without the power to review the challenged private conduct*** so there was no need to examine the State's exercise of any supervisory power.

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[7] This is the standard applied by the FTC below, which the Third Circuit reviewed. In its brief on the merits in this Court, the FTC employs a similar formulation, arguing that "absent a determination by state officials" that the challenged action is "consistent with the State's policy," there can be no state action immunity. Pet. Br. 16.

In *Midcal,* for example, State law required wine wholesalers to " '[p]ost a schedule of selling prices of wine to retailers or consumers. . . .' " 445 U.S. at 99 n.1 (quoting Cal. Bus. & Prof. Code Ann. § 24866 (West 1964)). State law further directed that no State-licensed merchant may sell wine to a retailer other than at the posted price. *Id.* at 100. The key factor in *Midcal,* however, was that under the governing law: ***"The State has no direct control over wine prices."*** *Id.* (emphasis supplied).

Similarly, in *324 Liquor Corp. v. Duffy,* 479 U.S. 335 (1987), State law required wholesalers to post monthly wholesale bottle prices with the State Liquor Authority and prohibited retailers from selling bottles at less than 112% of the posted price. As in *Midcal,* however, the State Liquor Authority did not have the power or responsibility to review these prices. Indeed, as the Government argued in that case, quoting from the New York State Court decision below, " '[l]iquor prices are set by the wholesalers and ***the State has no power to change the prices or review their reasonableness.***' " Brief for the United States as *Amicus Curiae* at 11, *324 Liquor Corp. v. Duffy,* 479 U.S. 335 (1987) (No. 84-2022) (emphasis supplied).

In the present case, however, the Government's brief argues that in *324 Liquor,* "the Court held that state monitoring that does not exert 'significant control' over the terms of a private restraint does not qualify as active supervision." Pet. Br. 18. Petitioner's Brief cites for this proposition a footnote in *324 Liquor* (479 U.S. at 345 n.7). In fact, that footnote merely rejected the claim that the Liquor Authority's power to waive the requirement for an individual retailer for "good cause shown" and the State Legislature's

periodic consideration of proposed changes to this law "exert[ed] any significant control over retail liquor prices." *Id.* This certainly does not translate into a holding that active supervision requires the exercise of "significant control." Moreover, in *324 Liquor,* the Court was not required to reach the question of the exercise of State supervision because ***the statutory scheme provided no authority or responsibility for State review of the posted prices.***

Most recently, in *Patrick v. Burget,* 486 U.S. 94 (1988), this Court rejected a claim of state action immunity because the State had no authority to review hospital peer review decisions. As the Court held: "The [State] Health Division's statutory authority over peer review relates only to a hospital's procedures; ***that authority does not encompass the actual decisions made by hospital peer-review committees.***" *Id.* at 102 (emphasis supplied) (footnote omitted). Indeed, the Court emphasized that the respondents had not demonstrated that either the State Health Division or the State judiciary "even could review" the challenged peer review decision. *Id.* at 101.

In the present case, in contrast to *Midcal, 324 Liquor,* and *Patrick,* it is clear, and apparently not disputed, that each of the States does in fact have the ultimate authority and responsibility to control the challenged fees. Pet. App. 30a (Arizona), 32a (Connecticut), 34a (Montana), 36a (Wisconsin). As a result, as the lower courts have noted, "*Patrick, Midcal,* and [*324 Liquor v.*] *Duffy* provide little guidance as to 'exercise' since none of them had to reach that question." *New England Motor Rate Bureau,* 908 F.2d at 1071.

Indeed, if the opportunity for State review were legally insufficient as a basis for finding active supervision, then this Court's analysis in *Patrick* of whether such review was available would have been totally unnecessary. In *Patrick,* there had been no judicial review of the challenged hospital peer review decision. Yet the Court devoted several pages of its opinion to an evaluation of whether such review were ***available*** under State law. 486 U.S. at 103-05. If the opportunity for review were legally insufficient to qualify for immunity absent its overt exercise, then there would have been no point in the Court's determining whether that opportunity existed. Thus, *Patrick* suggests, at least implicitly, that "***authority***" plus some "***opportunity for review***" by the State is sufficient for state action immunity.

There are, of course, strong federalism grounds supporting this conclusion. If federal courts must conduct trials of State regulators to determine whether the State sufficiently exercised its power to supervise the private conduct, then the result in *Parker* itself would have been different. Instead of reversing the district court's injunction, the Court would have remanded for trial to determine whether the California Agricultural Prorate Advisory Commission looked hard enough at, or merely "rubber stamped," the raisin prices collectively proposed by the growers. *Compare Parker,* 317 U.S. at 346-47, *with* Pet. Br. 16. One may imagine FTC lawyers cross examining W.B. Parker, Director of Agriculture, the members of the Agricultural Prorate Advisory Commission, and the members of the Program Committee for Raisin Proration Zone No. 1, to determine whether they engaged in a "meaningful examination" (Pet. App. 59a)

of the raisin prices proposed "[u]pon the petition of ten producers." *Parker,* 317 U.S. at 346.

In the present case, by second-guessing the States' ***exercise*** of their authorities, the FTC intruded more deeply upon the federalism basis for the doctrine than in any previous case. Rather than look at the authority of the State, it would undertake a trial to determine what the State has actually done in every regulatory matter. The standard, moreover, is essentially boundless, open to ever-changing interpretations by subsequent FTC staff and Commissioners, and federal district courts.

Moreover, as the commentators have explained, there is no basis for differentiating in this manner between federal and state agencies. "Charges of 'rubber stamping' industry proposals are as common in the federal field as in the state. There seems little reason to hold state agencies to a higher standard, particularly when Congress has been silent on the matter." I P. Areeda & D. Turner, *Antitrust Law* ¶ 213, at 75 (1978).

The weakness of the Government's argument based on this Court's prior decisions is further evidenced by its reliance on *Cantor v. Detroit Edison Co.,* 428 U.S. 579 (1976). The FTC cites *Cantor* as holding that an "affirmative determination by state officials" is required. Pet. Br. 20. However, as a result of this Court's decision in *Southern Motor,* the authority of *Cantor* as precedent is now open to serious question. In *Southern Motor* the Court repudiated at least three of the grounds for the holding in *Cantor,* and in effect limited Cantor to its unusual facts.

First, *Southern Motor* categorically rejected the idea expressed in *Cantor* that *Parker* does not shield

private parties. *Compare Southern Motor*, 471 U.S. at 56, *with Cantor*, 428 U.S. at 591-92 (actions by private party "not controlled by the *Parker* decision"). ***Second***, *Southern Motor* also held that immunity does not depend on a finding—which *Cantor* found essential—that antitrust exemption is "necessary" to make the State regulatory program work. *Compare Southern Motor*, 471 U.S. at 57 n.21 (criticizing this idea as based on "a questionable dictum in *Cantor*"), *with Cantor*, 428 U.S. at 597-98 & n.37. ***Third***, *Southern Motor* found that immunity does not require that the statute directly refer to the particular activity in question, so long as the State intended to displace competition. *Compare Southern Motor*, 471 U.S. at 64 ("A private party . . . need not 'point to a specific, detailed legislative authorization' for its challenged conduct"), *with Cantor*, 428 U.S. at 584 (criticizing state law because it "contains no direct reference to light bulbs").

As a result, *Cantor* cannot support the "affirmative review and approval" proposition for which the Government cites it.

Based on the consistent reasoning of these recent decisions, the Court should reject the proposed requirement for formal review and approval.

III. CHANGING THE LAW TO REQUIRE SUCH FORMAL APPROVAL WOULD CREATE UNJUSTIFIED UNCERTAINTIES AND UNFAIRLY EXPOSE STATE PROGRAMS TO ANTITRUST ATTACK FOR PRIOR CONDUCT WHICH SATISFIED THE *MIDCAL* TEST.

Over the past eleven years since this Court's decision in *Midcal* in 1980, and particularly since this Court's decision in *Southern Motor* in 1985, hundreds of State agencies and thousands of regulated parties

have directly or indirectly relied on the two-pronged *Midcal* test. If the test were now changed to require States "affirmatively to review and approve" challenged private conduct, expectations based on the prior rule would be dashed and State programs and regulated private parties which relied on the rule would be exposed unfairly to federal antitrust attack.

We submit that the Court should reject this result for two reasons. ***First***, the need for stability of the standard counsels against the change now advocated by the FTC. This is especially true here because Congress has had ample opportunity to review and revise the two-pronged *Midcal* test. Indeed, in amending the Sherman Act in 1984 to eliminate damage remedies for the acts of local governments, the House and Senate Committees repeatedly referred to and approved the *Parker* doctrine as enunciated by this Court. *See, e.g.*, H.R. Rep. No. 965, 98th Cong., 2d Sess. 5 (1984); S. Rep. No. 593, 98th Cong., 2d Sess. 1 (1984). The House Report also expressly acknowledged and approved the *Midcal* decision. *See*, H.R. Rep. No. 965, 98th Cong., 2d Sess. 6 & n.5, 22 (1984). Congressional acquiescence, coupled with this Court's traditional respect for a settled rule of law, strongly counsel against the proposed change in the state action doctrine.

In *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), the Court reaffirmed the filed rate doctrine of antitrust immunity. In so ruling, the Court rejected the suggestion that it overturn that doctrine, finding that intervening developments were "insufficient to overcome the strong presumption of continued validity that adheres in the judicial inter-

pretation of [the Sherman Act]." *Id.* at 424. Relying on the reasoning of Justice Brandeis, who first enunciated the doctrine, Justice Stevens concluded that:

> "Stare decisis is usually the wise policy because in most matters, it is more important that the applicable rule of law be settled than that it be settled right . . . . This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation."

Id. (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

In the instant case, any correction of the long-established state action doctrine "can be had by legislation." Indeed, in 1984, with respect to local governments, the Sherman Act was amended by legislation to ease, rather than increase, the burden on States, and without any change in the state action doctrine. As this Court has long held, Congressional reenactment of a statute "generally includes the settled judicial interpretation." *Pierce v. Underwood*, 487 U.S. 552, 567 (1988). For this reason as well, the Court should reject the FTC's argument for changing the law of state action immunity.

Second, the Court must consider the reliance of hundreds of State officials and State agencies, as well as thousands of regulated private parties, whose conduct satisfied the two-pronged *Midcal* test, but may fail the FTC's proposed new "affirmative review and approval" standard. These innocent parties would be exposed to retroactive antitrust attack, unless the Court applies the new law prospectively only. As the Court stated last Term:

> In determining whether a decision should be applied retroactively, this Court has consistently given great weight to the reliance interests of all parties affected by changes in the law. *See, e g., Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) ("Significant hardships would be imposed on cities, bondholders, and other[s] connected with municipal utilities if our decision today were given full retroactive effect"). To the extent that retrospective application of a decision burdens a government's ability to plan or carry out its programs, the application injures all of the government's constituents. These concerns have long informed the Court's retroactivity decisions.

American Trucking Ass'n, v. Smith, 110 S. Ct. 2323, 2334-35 (1990). The "reliance interests of the parties" affected by such change in the law of state action immunity—including the States, State and local regulatory agencies, and regulated private parties—all counsel against retroactive application of such a new rule.

CONCLUSION

The FTC's proposed restrictive rule would turn the state action doctrine on its head, destroying the federalism basis for *Parker*, causing regulatory "gridlock," and contributing to an increase in State-sponsored restraints. Moreover, it would unnecessarily disrupt settled doctrine in which Congress has acquiesced and expose existing State regulatory programs and regulated private parties to retroactive antitrust challenge.

For all of these reasons, *amicus curiae* respectfully urges the Court to reject the FTC's proposed "affirmative review and approval" standard for state action immunity.

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